Supreme Court, U.S.
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No. 92-1661

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES ROBERT WINKLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by excluding evidence that frequent flyer miles that petitioner converted to his own use had minimal value.

2. Whether the district court's calculation of the loss caused by petitioner's fraud was clearly erroneous.

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OPINION BELOW

The opinion of the court of appeals is not yet reported. It was originally filed as an unreported memorandum opinion (Pet. App. B1-B8), and the judgment was noted at 983 F.2d 1079 (Table) (withdrawn). On April 20, 1993, the court of appeals modified the opinion and redesignated it for publication. *United States* v. *Mullins*, Nos. 91-50107, 91-50108 & 91-50109.*

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1993. The petition for a writ of certiorari

* We have lodged copies of the April 20, 1993, slip opinion with the Court.

was filed on April 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371; mail fraud, in violation of 18 U.S.C. 1341; use of fictitious names in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1342; and wire fraud, in violation of 18 U.S.C. 1343. Petitioner was sentenced to 48 months' imprisonment and a $250,000 fine. The court of appeals affirmed. Pet. App. B1-B8.

1. Petitioner and co-defendant Phillip Rinker were co-owners and operators of North Ranch Travel, a storefront travel agency employing approximately six persons. *Mullins*, slip op. 3897. Through their access to the American Airlines automatic reservation system, petitioner, Rinker, and a third co-defendant fraudulently transferred frequent flyer miles to themselves and used those miles to obtain American Airlines tickets. *Id.* at 3896.

The scheme worked as follows: Defendants first set up numerous frequent flyer accounts in fictitious names, using the addresses of various mail-receiving services in Los Angeles. Then, using their American Airlines reservation terminal—leased by North Ranch from American—defendants scanned American's flight reservations to find passengers who were not enrolled in the American Frequent Flyer program. Within 24 hours after those passengers finished their trips, the defendants deleted their names and replaced them with the names and frequent flyer

numbers for the fictitious accounts. *Mullins*, slip op. 3898-3899.

When sufficient mileage had been accumulated in the fictitious accounts, the defendants submitted claims in the names of the fictitious account-holders for free travel certificates. The defendants then either exchanged the certificates for free tickets to sell to North Ranch customers or they sold the certificates or tickets to a broker. *Mullins*, slip op. 3899.

Between January 1987 and February 1988, the defendants created 850 fictitious accounts, 726 of which had accrued more than 61 million frequent flyer miles. Using those accounts, the defendants obtained or caused to be obtained 546 airline tickets. *Mullins*, slip op. 3899.

2. Prior to trial, the government moved *in limine* to exclude evidence that the frequent flyer miles lacked value. Petitioner responded that value is an element of the government's prima facie case because the object of a fraud scheme must be a thing of value. Petitioner stated that he could introduce evidence that American placed no value on the miles below various levels (those levels needed to obtain free trips). He also stated that he would introduce internal American memoranda that would show that passengers flying free in empty seats benefited the airline and did not result in a financial loss. In petitioner's view, American's failure to give value to the mileage for accounting purposes showed that American believed that the miles were the property of the passengers who flew the trips, and who "abandoned" the miles by not claiming them. During the pretrial hearings, defense counsel conceded that

the airline tickets themselves—as opposed to the frequent flyer miles—were the property of American Airlines. Gov't C.A. Br. 15-16.

The trial court held that the question of the value of the mileage was not at issue if the alleged scheme "was to obtain * * * airline tickets and coupons." C.A. Excerpt of Record 24. At the close of the government's case, the district court again found the proffered evidence regarding the value of the frequent flyer miles to be "immaterial" because "[t]he tickets * * * do have value" and "the scheme was to get the tickets." *Id.* at 28.

3. Following petitioner's conviction, the probation officer recommended a nine-level enhancement to his base offense level based upon a finding that the loss caused by the scheme was valued at between $1 million and $2 million. See Sentencing Guidelines § 2F1.1 (1987). To determine the amount of the loss, the probation officer computed the fair market value of the 546 fraudulently obtained tickets to be $1,319,000. *Mullins*, slip op. 3908.

The district court accepted and incorporated the $1.3 million figure from the presentence report. *Mullins*, slip op. 3908. But the court discounted that figure and ultimately sentenced petitioner based on a "loss" under Guidelines § 2F1.1 in the range of $500,001 to $1,000,000. That resulted in an eight-level increase, rather than the nine-level increase that would have been required by the original $1.3 million presentence report calculation.

4. In the court of appeals, petitioner argued that he had not deprived American Airlines of property, because credit for frequent flyer miles belonged to the passenger rather than to the airline. Petitioner

also contended that he should have been permitted to present evidence concerning the lack of value of the miles to American. Finally, he argued that he had a good faith belief in the lawfulness of his conduct and was therefore entitled to a corresponding jury instruction pursuant to this Court's opinion in *Cheek* v. *United States*, 498 U.S. 192 (1991).

The court of appeals affirmed petitioner's conviction. The court held that the district court properly excluded evidence concerning the lack of value of the frequent flyer miles, because the object of petitioner's scheme was to obtain "things of value, *viz.*, credit for miles flown by others and mileage coupons that were convertible to free airline tickets." *Mullins*, slip op. 3902. The court noted that that resulted in "the imposition of liabilities on American that American would not otherwise have borne." *Ibid.* Petitioner's evidence that the frequent flyer miles were themselves of no value was irrelevant, since that evidence did not cast doubt on the conclusion that the coupons convertible to airline tickets had substantial value.

The court further held that the district court had properly instructed the jury on good faith, and that petitioner's offer of evidence on value "had nothing to do with his claim that he lacked wilfulness." *Mullins*, slip op. 3903 n.5.

Petitioner also objected to the district court's finding that his scheme had resulted in a loss to American of $500,001 to $1,000,000. The court of appeals observed that

> [a] product's fair market value ordinarily constitutes an appropriate measure of loss. In ascertaining a product's fair market value, "[t]he loss need

> not be determined with precision, and may be inferred from any reasonably reliable information available."

Mullins, slip op. 3908 (citation omitted; quoting Sentencing Guidelines § 2B1.1, comment n.3). The court concluded that the record showed that the district court accepted the calculation of loss on the presentence report and then discounted that figure to reflect the fact that petitioner "did not profit from every ticket obtained." *Mullins*, slip op. 3908. Since the district court had committed a mathematical error in calculating petitioner's sentence, however, the court of appeals remanded for resentencing. Pet. App. B7.

ARGUMENT

1. Petitioner contends (Pet. 15-22) that the district court erred in excluding his proffered evidence showing that frequent flyer miles had no value and belonged to the traveling passenger rather than to American Airlines. Petitioner argues that the evidence he sought to present could have negated an element of the offenses of mail and wire fraud because it would have shown that the frequent flyer miles were not property.

Petitioner is correct that in order to establish that he violated the mail and wire fraud statutes, the government was required to show that he defrauded American Airlines of something of value. *Mc Nally* v. *United States*, 483 U.S. 350 (1987). There is no doubt, however, that petitioner sought to obtain, and did obtain, things of value from American—airline tickets. As the district court found, the question whether one of the intermediate means used to obtain

the tickets—the frequent flyer miles—did or did not have value and belong to American was not relevant to this case. Accordingly, the district court properly excluded petitioner's proffered evidence as to the lack of value of the frequent flyer miles.

Petitioner argues (Pet. 19-21) that he did not in fact defraud American Airlines. He claims that he simply took frequent flyer miles that had been abandoned by those who had earned them. That argument is unavailing. Ultimately, petitioner deprived American of a valuable commodity each time one of the fraudulently obtained tickets was redeemed. American's frequent flyer program was designed to award tickets only to persons who traveled frequently on American Airlines. The miles were made non-transferable so that those miles that were awarded—or potentially available to be awarded—to less frequent flyers would not result in claims for free tickets. Petitioner's scheme of accumulating frequent flyer miles that could have been credited to persons not in a position to claim free tickets subjected American to claims for free travel based on the fraudulent violation of the terms of American's frequent flyer program—terms designed to limit the number of free tickets American would be required to dispense. The provision of free tickets caused injury to American by requiring the airline to carry passengers for free and by depriving the airline of its opportunity to obtain revenue from those passengers. See *United States* v. *Schreier*, 908 F.2d 645, 647 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991); *United States* v. *Loney*, 959 F.2d 1332, 1337 (5th Cir. 1992) (scheme adding bogus frequent flyer mileage to existing accounts deprived airline of revenues).

2. Petitioner contends (Pet. 21-22) that the exclusion of evidence concerning ownership of the miles deprived him of the ability to present the defense that he acted in good faith. He argues that this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991), entitled him to present that evidence.

This Court's decision in *Cheek* has nothing to do with this case. Although recognizing "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution," 498 U.S. at 199, this Court stated in *Cheek* that Congress had "carv[ed] out an exception" to that general rule for certain criminal tax offenses, in light of the "complexity of the tax laws." *Id.* at 200. Under those statutes, willfulness connotes a voluntary, intentional violation of a known legal duty, which may be negated by a good faith belief that one has complied with the law or had a good faith misunderstanding of the law. *Id.* at 199.

Petitioner was not charged under a tax statute, and the mail and wire fraud statutes under which he was charged are not analogous to the statute at issue in *Cheek*. Nor does petitioner suggest any reason why additional exceptions to the general rule that ignorance of the law is no defense should be made in the case of prosecutions under the mail and wire fraud statutes. Accordingly, *Cheek* has no application to this case.

Although petitioner's belief that mail and wire fraud were not illegal would not have constituted a defense to the charges in this case, his lack of intent to engage in a scheme to defraud would have constituted such a defense. See, *e.g.*, *United States* v. *Alexander*, 849 F.2d 1293, 1301 (10th Cir. 1988). He

thus was free to testify that he lacked intent to defraud because he believed that his scheme did not defraud American of anything of value, and the district court did nothing to preclude such testimony. The evidence petitioner proffered concerning whether the frequent flyer miles had value, however, was irrelevant to whether he intended to defraud American of something of value, and its exclusion was therefore appropriate. In short, as the court of appeals recognized, "[petitioner's] offer of evidence on the issues of value and abandonment had nothing to do with his claim that he lacked wilfulness." *Mullins*, slip op. 3903 n.5.

3. Petitioner contends (Pet. 22-27) that the district court failed to provide sufficient reasons for its finding that the loss caused by petitioner should be valued between $500,001 and $1,000,000. Fed. R. Crim. P. 32 (c)(3)(D) provides:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. * * *

The district court complied with that rule. By starting with the calculation of loss from the presentence report, the court found specifically that petitioner's objections to the calculation were invalid. The court then "adjusted" the calculated figure

because it believed "that the appropriate valuation should be * * * from 500,000 to one million dollars, calculating the loss to the airlines and also the value to the defendants." Sentencing Tr. 95-96. As the court of appeals stated, the adjustment was necessary "to reflect the fact that [petitioner] did not profit from every ticket obtained." Pet. App. B6.

Petitioner apparently objects to the fact that the district court did not state the precise value of the tickets within the $500,001 to $1,000,000 range nor write an opinion explaining its finding. The Sentencing Guidelines, however, make clear that the "loss need not be determined with precision, and may be inferred from any reasonably reliable information available." See *United States* v. *Pemberton*, 904 F.2d 515 (9th Cir. 1990) (district courts have broad discretion in determining the value of stolen goods). Since there was no need for the district court to determine where the value of the airline tickets fell within the $500,001 to $1,000,000 range specified in the Guidelines, the court of appeals correctly found that the district court's "loss calculation was adequate under the circumstances." *Mullins*, slip op. 3908.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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